87-410

No. 87-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MEXICANA AIRLINES,

Petitioner,

v.

JOSEPH D. WOLGEL and EDYTHE R. WOLGEL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Questions Presented for Review

1. In light of the Court's recent decision in *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, —— U.S. ——, 107 S.Ct. 2759 (1987), where the subject matter of a claim arises from the non-performance of a contract providing for "international transportation" within the meaning of Article 1 of the Warsaw Convention, and the federal statute sued upon contains no statute of limitations:

   (a) should the two year period of limitation in Article 29 of the Warsaw Convention be "borrowed" to promote uniformity (the overriding purpose of the Warsaw Convention) and thereby avoid "intolerable uncertainty and time-consuming litigation", or

   (b) should a particular state's "catchall" statute of limitations be applied even though such a claim thereby may be subject to the possibility of a multiplicity of applicable limitations periods of varying lengths in different states?

2. Where a contract providing for "international transportation by air" within the meaning of Article 1 of the Warsaw Convention is not performed, does the two year period of limitation of Article 29 of the Convention apply to claims based upon national law as opposed to the liability provisions of the Warsaw Convention?

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No. 87-

IN THE

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OCTOBER TERM, 1987

MEXICANA AIRLINES,

Petitioner,

v.

JOSEPH D. WOLGEL and EDYTHE R. WOLGEL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Mexicana Airlines (hereinafter Mexicana[1]) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on June 12, 1987.

Opinions Below

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 821 F.2d 442 (7th Cir. 1987) and is printed in the Appendix to this Petition at pages 1a to 10a. The opinion of the United States District Court for the Northern District of Illinois is reported

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[1] Pursuant to Rule 28.1 of the Supreme Court Rules, Petitioner states that it has the following subsidiaries:

AT, S.A.
Transportacion Aerea Mexicana, S.A.
Datatronic, S.A. de C.V.

unofficially at 20 Av. Cas. 17,301 (N.D. Ill. 1986) and is printed in the Appendix at pages 11a-13a.

Jurisdiction

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 12, 1987. No petition for reconsideration was filed in the Court of Appeals. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

Treaty and Statutes Involved

This case involves the Convention for the Unification of Certain Rules Relating to International Transportation By Air and Additional Protocol, concluded at Warsaw, October 12, 1929 (commonly known and herein referred to as the Warsaw Convention or simply the Convention). 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §1502 note (1976). The pertinent provisions of the Warsaw Convention are printed in the Appendix at pages 14a-17a.

This case also involves §404(b) of the Federal Aviation Act of 1958 which provides:

> No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

49 U.S.C. §1374(b). This section was repealed effective January 1, 1983. 49 U.S.C. §1551(a)(2)(B).

The Illinois "catchall" statute of limitations, adopted by the Court below, provides:

> Five year limitation. Except as provided in Section 2-725 of the "Uniform Commercial Code", approved July 31, 1961, as amended, and Section 11-13 of "The Illinois Public Aid Code", approved April 11, 1967, as amended, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.

Ill.Ann.Stat. ch. 110, ¶13-205 (Smith-Hurd 1984).

Statement of the Case

This is an action[2] for breach of contract. Respondents Joseph and Edythe Wolgel seek to recover money damages from petitioner Mexicana for Mexicana's refusal to allow them to board Mexicana flight 803 from Chicago, Illinois to Acapulco, Mexico on April 17, 1981.[3]

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[2] Respondents commenced this action in the Circuit Court of Cook County, Illinois, Municipal Department-First District on April 17, 1986. The action was timely removed to the United States District Court for the Northern District of Illinois, Eastern Division, where jurisdiction was predicated on Mexicana's status as a "foreign state" within the meaning of the Foreign Sovereign Immunities Act, 28 U.S.C. §1602 *et seq.*

[3] There is a dispute as to whether the Wolgels complied with Mexicana's pre-boarding check-in requirements. The Wolgels were denied passage aboard Mexicana flight 803 because all seats were filled prior to their arrival at the Mexicana check-in counter in Chicago.

It is undisputed that the passenger tickets issued to the Wolgels, upon which this suit is based, provided for "international transportation" within the meaning of Article 1(2) of the Warsaw Convention. Any claim arising out of the passenger tickets evidencing a contract of transportation between a carrier and a passenger is subject to the uniform liability rules of the Convention which applies "to all international transportation of persons, baggage or goods for hire." Article 1(1), Warsaw Convention, 49 Stat. 3014. "International transportation" is defined in Article 1(2) of the Convention to be:

> any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention.

49 Stat. 3014.

After removal and in lieu of answer, Mexicana moved to dismiss the complaint on the ground that the action was time barred pursuant to the two year period of limitation set forth in Article 29 of the Warsaw Convention. Mexicana argued that any cause of action would have arisen on April 17, 1981 when the Wolgels were denied boarding. The Wolgels waited until April 17, 1986 to commence this action.

The District Court, finding that the provisions of the Warsaw Convention applied to the Wolgels' claim and that the Convention conditioned their remedy, granted

Mexicana's motion and dismissed the complaint as time-barred by Article 29 of the Convention. App. 11a-13a. The District Court held correctly that the Wolgels' tardiness in not filing the action until five years after the alleged breach of contract barred the relief sought.

The Court of Appeals reversed and held that because the claim of the Wolgels arose outside of the scope of the Convention's presumptive liability provisions[4] the two year period of limitation set forth in Article 29 had no applicability to the claim asserted by the Wolgels.

The Court of Appeals premised its decision on the misapprehension that a condition precedent to the application of Article 29 of the Warsaw Convention is that the cause of action must be based upon the Convention itself and not upon national law.

In rendering its decision, the Court of Appeals erroneously ignored the basic purpose of the Warsaw Convention which is to achieve world-wide uniformity of the law governing the rights and obligations of carrier and passenger where the contract of transportation provides for "international transportation" as defined by the Convention and the claim arises from the performance or non-performance thereof. *See, e.g., Reed* v. *Wiser,* 555 F.2d 1079, 1090 (2d Cir.), *cert. denied,* 434 U.S. 922 (1977). In applying a state statute of limitations to a claim arising out of the non-performance of a Convention contract of transportation, the Court of Appeals has subjected such claims to the vagaries and non-uniformity of state laws.

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[4] Article 17—presumptive liability for injury to or death of passengers; Article 18—presumptive liability for damage, destruction or loss of checked baggage or goods; Article 19 presumptive liability for delay in the transportation of passengers, baggage or goods.

REASONS FOR GRANTING THE WRIT

1. Cases Based Upon a Failure to Perform a Contract of "International Transportation by Air", as Defined in the Warsaw Convention, a Treaty of the United States, Should Be Subject to the Uniform Period of Limitation of Article 29.

The court below erroneously concluded that a claim for breach of contract of "international transportation by air" was not governed by the two year period of limitation set forth in Article 29 of the Warsaw Convention, App. 16a, and that a state "catchall" statute of limitations is applicable to such a claim. The writ should be granted in the exercise of the Court's supervisory authority over lower courts to prevent the application of various state statutes of limitations to claims based upon the breach of a contract subject to a treaty of the United States.

The interests of uniformity in the application of the provisions of the Warsaw Convention mandates the application of the two year period of limitation of Article 29 to all claims arising out of the contract of "international transportation by air", regardless of the state in which the claim is brought or the theory upon which the claim is based. The absence of any Federal statute of limitations for such claims, and the presence in the Warsaw Convention of a clearly applicable period of limitation, makes proper the "borrowing" of the Article 29 two year period of limitation and its application to all claims arising from a Warsaw Convention contract of transportation. This will ensure the application of a uniform law to claims arising from the contract of "international transportation by air" regardless of where brought or upon what basis in national law.

As the Ninth Circuit Court of Appeals stated in *In re Mexico City Aircrash of October 31, 1979,* 708 F.2d 400 (9th Cir. 1983):

> . . . the overriding policy goal embodied in the Convention is the desire to formulate a uniform and universal set of legal rules to govern international air transportation.

708 F.2d at 411, citing *Benjamins* v. *British European Airways,* 572 F.2d 913 (2d Cir. 1978), *cert. denied,* 439 U.S. 1114 (1979) and *Reed* v. *Wiser,* 555 F.2d 1079 (2d Cir.), *cert. denied,* 434 U.S. 922 (1977).

If the uniform period of limitation of Article 29 is not applied to such claims, a panoply of various state statute of limitations will be applied by the lower courts in adjudicating claims arising from the international contract of transportation by air. For example, assuming that a lower court applies a statute of limitations for breach of written contract (i.e. the passenger ticket), the applicable period of limitation could vary from three years in the District of Columbia, D.C. Code Ann. tit. 12, §301 (1981), to fifteen years in Ohio, Ohio Rev. Code Ann. §2305.06 (Page 1981) and twenty years in Indiana, Ind. Code Ann. §34-1-2-2 (Burns 1986). The vagaries of application of these state limitation periods to international transportation claims were certainly not what the Convention delegates intended when the Convention was drafted.

As Mr. Giammini, the delegate from Italy, stated:

> If one considers that the period of limitation is long enough and that, particularly taking into account the causes of suspension, it may, according to the law of several countries, be prolonged indefinitely, it's not a good idea ot [sic] refer the determination of the afore-

> mentioned causes to the law of the court chosen by the plaintiff.

R. Horner & D. Legrez, Second International Conference on Private Aeronautical Law Minutes, Warsaw, 1929, p. 112-113. (1975).

A commentator on the Warsaw Convention has taken a similar view:

> First, since aviation was obviously going to link many lands with different languages, customs, and legal systems, it would be desirable to establish at the outset a certain degree of uniformity. The Convention achieved this almost completely as to documentation—tickets, waybills, and the like—and to a degree as to the procedure for dealing with claims arising out of international transportation and the substantive law applicable to such claims. Briefly, there was to be a two-year period of limitation (Article 29) . . .

Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 HARV. L. REV. 497 at 498-99 (1967). In short, the Warsaw Convention "created a uniform body of law pertaining to the rights and responsibilities of passengers in international air carriers". *Mahfoud* v. *Eastern Air Lines, Inc.,* 17 Av. Cas. 17,714, at 17,716 (W.D. La. 1982), *aff'd,* 729 F.2d 777 (5th Cir. 1984), *aff'd by equally divided Court,* 474 U.S. 213 (1985).

If the decision of the Court of Appeals is allowed to stand, state statutes of limitations of varying lengths will be applied where the subject matter of the action arises from an international contract of transportation governed in all other respects by the Warsaw Convention. The application of various state statutes of limitations, be they

contractual or "catchall", would lead to uncertainty and confusion on the part of both air travellers and air carriers as to their rights and liabilities. How long, for example, must an airline keep its computerized reservation records? Is it reasonable to expect a major air carrier or foreign air carrier to keep all of its reservation records for ten years because of the possibility of a breach of contract suit in the distant future as a result of an oversold flight?

The confusion and uncertainty that would result can be avoided completely by adoption of the uniform two year period of limitation in Article 29 of the Warsaw Convention to all claims arising from a contract for international transportation by air subject to the Convention. *See, e.g., Agency Holding Corp.* v. *Malley-Duff & Associates,* —— U.S. ——, 107 S.Ct. 2759 (1987); *DelCostello* v. *International Brotherhood of Teamsters,* 462 U.S. 151 (1983).

There is no federal statute of limitations expressly applicable to a claim arising out of an alleged violation of §404(b) of the Federal Aviation Act. That section was repealed effective January 1, 1983, more than three years before the Wolgels' action was commenced. 49 U.S.C. §1551 (a)(2)(B); *Ramirez de Arellano* v. *Eastern Air Lines, Inc.,* 629 F. Supp. 189 (D.P.R. 1985).

The Court has held that a federal court is not required to apply a state statute of limitations to a claim where a federal statute of limitations would be a more appropriate choice. Specifically,

> the [Rules of Decision] Act authorizes application of state law only when federal law does not "otherwise require or provide". . . . [T]he choice of a limitations period for a federal cause of action is itself a question of federal law. If the answer to that question

> (based on the policies and requirements of the underlying cause of action) is that a timeliness rule drawn from elsewhere in federal law should be applied, then the Rules of Decision Act is inapplicable by its own terms.

DelCostello v. *International Brotherhood of Teamsters,* 462 U.S. 151, 159 n. 13 (1983).

The Court has recognized that "[i]n some circumstances . . . state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law" and that "[i]n those instances, it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law." *DelCostello, supra,* 462 U.S. at 161.

This Court has, in several cases, declined to borrow state statutes but instead has used timeliness rules drawn from federal law—either express limitations from related federal statutes or such alternatives as laches. *See McAllister* v. *Magnolia Petroleum Co.,* 357 U.S. 221 (1958) (limitations period of Jones Act applied to a seaworthiness action under general admiralty law); *Occidental Life Insurance Co.* v. *Equal Employment Opportunity Commission,* 432 U.S. 355 (1977) (court refused to consign federal lawsuits instituted by the EEOC to the "vagaries of diverse state limitations statutes"); *DelCostello* v. *International Brotherhood of Teamsters,* 462 U.S. 151 (1983) (state limitations period rejected in favor of period found in §10(b) of the NLRA); *Agency Holding Corp.* v. *Malley-Duff & Associates,* —— U.S. ——, 107 S.Ct. 2759 (1987) (state limitations period rejected in civil RICO actions in favor of uniform federal limitations borrowed from the Clayton Act).

In *Malley-Duff, supra,* this Court rejected the Third Circuit's decision to "borrow" a state statute of limitations

in a civil RICO action, reasoning that RICO cases commonly involve interstate transactions, and the possibility that a multiplicity of applicable state limitations periods might be applied in the different states would promote forum shopping and complex, expensive and unnecessary litigation. 107 S. Ct. at 2766. The Court found that a uniform federal statute of limitations was required in civil RICO actions "to avoid intolerable 'uncertainty and time-consuming litigation.'" 107 S. Ct. at 2764. Quoting *Wilson* v. *Garcia*, 471 U.S. 261, 275 n.34 (1985), to explain the policy reasons for this decision, the Court stated:

> Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts will apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in response.

107 S. Ct. at 2764.

The Court concluded that the "federal policies at stake and the practicalities of litigation strongly suggest" that a uniform federal statute of limitations (borrowed from the Clayton Act) would be "a significantly more appropriate statute of limitations than any state limitations period." 107 S. Ct. at 2766.

Folowing its decisions in *DelCostello* and *Malley-Duff*, the Court should, in view of the strong interest of the United States in enforcing the provisions of a treaty to which this country and more than 120 other nations are adherents,[5] hold that the period of limitation found in Article 29 of the Warsaw Convention applies to all claims arising from international transportation by air.

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[5] *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 247 (1984).

2. The Warsaw Convention Supersedes Inconsistent State Statutes of Limitations.

A treaty of the United States should be interpreted to effectuate its evident purposes. *Bacardi Corp.* v. *Domenech*, 311 U.S. 150 (1940); *Factor* v. *Laubenheimer*, 290 U.S. 276 (1933). The evident purpose of the Warsaw Convention is to establish uniform liability rules for actions arising from the contract of transportation. Thus, even though the Wolgels' claim for "bumping" may not be construed to be a claim for "delay" within the meaning of Article 19 of the Warsaw Convention, as the court below has held, the claim undeniably arises from the international contract of transportation by air and the two year period of limitation found in Article 29 of the Warsaw Convention, not a state statute of limitations, should be applied to the claim. *See, e.g., L.B. Smith, Inc.* v. *Circle Air Freight Corp.*, 128 Misc. 2d 12 (Sup.Ct. Onondaga Co. 1985), where the Court held that the Warsaw Convention two year period of limitation barred a third party complaint for contribution and indemnity on breach of an international contract of transportation by air, notwithstanding that under New York law the claim for contribution and indemnification did not accrue until the payment of the underlying judgment. N.Y. Civ. Prac. Law §213 (McKinney 1973); *see also Magnus Electronics, Inc.* v. *Royal Bank of Canada*, 611 F. Supp. 436 (N.D. Ill. 1985); *Split End, Ltd.* v. *Dimerco Express (Phils) Inc.*, 19 Av. Cas. 18,364 (S.D.N.Y. 1986).

CONCLUSION

For the reasons set forth above, petitioner Mexicana Airlines urges that this Petition for a Writ of Certiorari be granted.

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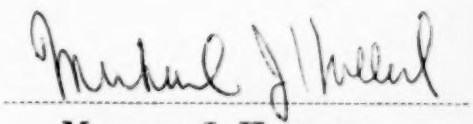
New York, New York
September 10, 1987

Certificate of Service

I hereby certify that I have, this 10th day of September, 1987 served the foregoing Petition for a Writ of Certiorari upon respondents by depositing same in a United States mail box at 1251 Avenue of the Americas, New York, New York 10020 with first class postage prepaid, addressed to Joseph D. Wolgel, 7 South Dearborn Street, Chicago, Illinois 60603 and DiMonte & Lizak, counsel of record for respondents, 5201 North Harlem Avenue, Chicago, Illinois 60656.

September 10, 1987



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Counsel for Petitioner

APPENDIX

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Opinion of Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 86-2308

JOSEPH D. WOLGEL and EDYTHE R. WOLGEL,

Plaintiffs-Appellants,

v.

MEXICANA AIRLINES, a Mexican corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 3409—Charles R. Norgle, *Judge.*

ARGUED JANUARY 15, 1987—DECIDED JUNE 12, 1987

Before WOOD, JR. and FLAUM, *Circuit Judges,* and GRANT, *Senior District Judge.**

FLAUM, *Circuit Judge.* Joseph and Edythe Wolgel appeal from the dismissal of their claim for discriminatory "bumping" under § 404(b) of the Federal Aviation Act of 1958, 49 U.S.C. app. § 1374(b) (1982). The district court

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* The Honorable Robert A. Grant, Senior District Judge for the United States District Court for the Northern District of Indiana, is sitting by designation.

held that their claim was time-barred by the two-year statute of limitations contained in the Warsaw Convention. We reserve and remand for further proceedings.

I.

Because the Wolgels' complaint was dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), we must accept their factual allegations as true. *See Ed Miniat, Inc.* v. *Globe Life Ins. Group,* 805 F.2d 732, 733 (7th Cir. 1986). According to their complaint, Mr. and Mrs. Wolgel arrived at O'Hare Airport on April 17, 1981, with two round-trip tickets that they had purchased from the defendant Mexicana Airlines for travel on that day from Chicago to Acapulco, Mexico. The Wolgels held confirmed reservations, and had complied with the relevant pre-boarding conditions. However, when the Wolgels presented their tickets and baggage to Mexicana's passenger agent, they were informed that no seats were available on their flight. In short, the Wolgels had been "bumped." The Wolgels assert that this incident occurred pursuant to a policy of substantial and consistent overbooking and overselling of confirmed reservation passenger seating.

The Wolgels submitted a claim for boarding compensation, as provided for by Civil Aeronautics Board regulations, but Mexicana refused to compensate them. Consequently, on April 17, 1986, exactly five years after their injury, the Wolgels filed suit in the Circuit Court of Cook County, alleging breach of contract, tortious breach of a contractual relationship between the parties, and discriminatory bumping (bumping in violation of Mexicana's own priority rules) in violation of § 404(b) of the Federal Aviation Act, 49 U.S.C. app. § 1374(b) (1982). On May 14, 1986, Mexicana removed the suit to federal district court

pursuant to 28 U.S.C. § 1441, on the ground that Mexicana, a corporation wholly owned by the government of Mexico, is a foreign state within the meaning of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1982). Mexicana then moved to dismiss the complaint on the ground that the Wolgels' action was time-barred under the two-year statute of limitations contained in Article 29 of the Warsaw Convention ("the Convention"). The district court granted Mexicana's motion and dismissed the complaint. This appeal followed.

II.

The Wolgels base their federal claim on § 404(b) of the Federal Aviation Act ("FAA"), 49 U.S.C. app. § 1374(b) (1982) (repealed 1983). Section 404(b) prohibited domestic and foreign air carriers from subjecting any person to "any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." [1]

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[1] Section 404(b) read in full:

> (b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonably preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

49 U.S.C. app. § 1374(b) (1982) (repealed 1983).

On January 1, 1983, this provision ceased to be in effect, except insofar as the section requires air carriers to provide safe and adequate service. 49 U.S.C. app. § 1551(a)(2)(B) (1982). The common law rule is that the repeal of a statute abates all actions pending under it, even those on appeal. *See United States* v. *Gruttadauro*, No. 86-1722, slip op. at 3 n.2 (7th Cir. May 7, 1987). In this case, however, the federal savings statute, 1 U.S.C. § 109 (1982), preserves the Wolgels' claim.

In *Karp* v. *North Central Airlines,* 583 F.2d 364 (7th Cir. 1978), this court held that § 404(b) created an implied private right of action for passengers of a domestic airline who were bumped due to a failure of the airline to follow its own boarding priority rules. However, neither in *Karp* nor in later cases did this court establish a statute of limitations for such actions. The Wolgels urge us to borrow the Illinois "catch-all" statute of limitations, which provides a five-year period in which to bring suit. *See* Ill. Ann. Stat. ch. 110, ¶ 13-205 (Smith-Hurd 1984).

Mexicana Airlines argues, however, that the Warsaw Convention,[2] 49 U.S.C. § 1502 (1982) (note), is the Wolgels' exclusive remedy. The Warsaw Convention is a multilateral treaty to which both the United States and Mexico are adherents. The Convention provides for uniform documentation for passengers and cargo on international flights, and limits the liability of air carriers in the event of accident or loss. *In re Aircrash in Bali,* 684 F.2d 1301, 1304-05 (9th Cir. 1982). The Convention also provides a remedy for claims of personal injury, loss of or damage to baggage, and delay. Actions based on the Convention must be brought within two years. *See* Warsaw Conv., Art. 29(1). The district court held that the Convention provided the Wolgels' only remedy. Because the Wolgels did not file suit until five years after their injury, the district court held that their claim was time-barred.

We conclude that the Wolgels' claim falls outside the Warsaw Convention, because the Wolgels seek damages for the bumping itself, rather than incidental damages due

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[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (adherence of United States proclaimed Oct. 29, 1934).

to their delay. Therefore, the two-year statute of limitations for claims covered by the Warsaw Convention does not apply to this case. Borrowing from the analogous state statute of limitations, we hold that the applicable statute of limitations for a claim of discriminatory bumping under the FAA is five years. Because the Wolgels' complaint was timely filed, we reverse the judgment of the district court and remand for further proceedings.

A.

Article 19 of the Warsaw Convention provides that "[t]he carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods." The first question in this case is whether this provision extends to claims of discriminatory bumping. We conclude that it does not.

"'[T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.'". *Air France* v. *Saks*, 470 U.S. 392, 396 (1985) (*quoting Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431-32 (1943)). The history of the Warsaw Convention indicates that the drafters of the Convention did not intend the word "delay" in Article 19 to extend to claims, such as the Wolgels', that arise from the total nonperformance of a contract.

The Second International Diplomatic Conference on Private Aeronautical Law was convened in Warsaw, Poland on October 4, 1929. On the fourth day of the conference, the conference delegates discussed Article 21, the predecessor of Article 19. Mr. Ambrosini, the delegate from

Italy, remarked that Article 21 did not provide a remedy for nonperformance:

> For example, goods are delivered to the carrier. They are within the aerodrome, the aircraft did not leave, the contract is not performed. Must one say that the carrier is liable or not? Without doubt, he is, but it must be so said in the Convention, but Article 21 says nothing.

Second International Conference on Private Aeronautical Law, Minutes 76 (R. Horner & D. Legrez trans. 1975). Mr. Ambrosini proposed that Article 21 be amended to provide for liability "in case of nonperformance of the contract, or of delay." *Id.* However, after further discussion of this question, it became clear among the delegates that there was no need for a remedy in the Convention for total nonperformance of the contract, because in such a case the injured party has a remedy under the law of his or her home country. *See id.* at 76-77 (remarks of Mr. Ripert). The delegates therefore agreed that the Convention should not apply to a case of nonperformance of a contract. *Id.* at 77.

This case is one of nonperformance of a contract. The Wolgels are not attempting to recover for injuries caused by their delay in getting to Acapulco. Rather, their complaint is based on the fact that, as far as the record shows, they never left the airport. Because the Wolgels' claim is for total nonperformance of a contract, the Warsaw Convention is inapplicable.

The decision in *Mahaney* v. *Air France*, 474 F.Supp. 532 (S.D.N.Y. 1979), supports our conclusion. In *Mahaney*, the plaintiff was bumped from a flight between New York

and Puerto Vallarta, Mexico. Three years later, she sued the defendant under § 404(b) of the FAA. The defendant argued that the suit was barred by the two-year statute of limitations contained in Article 29 of the Warsaw Convention. The court held that the plaintiff's claim for the cost of renting a van—an incidental cost she incurred because of the delay—arose under the Convention. This claim was therefore time-barred. *Id.* at 534. However, the rest of the plaintiff's claims were based on the discriminatory bumping itself, and the emotional harm caused by the bumping. The *Mahaney* court held that these claims did not arise under the Convention, because they did not stem from delay. Thus, the Convention's statute of limitations did not bar the remainder of the plaintiff's claims. *Id.* at 535.

Mexicana relies on *Harpalani* v. *Air India*, 622 F.Supp. 69 (N.D. Ill. 1985). In *Harpalani*, the plaintiffs, who were bumped from a flight between Bombay, India and New York, sued under Article 19 of the Warsaw Convention. The court held that the Warsaw Convention provided their exclusive cause of action, and dismissed the plaintiffs' other federal and state claims as "preempted" by the Convention. *Id.* at 73. However, in reaching its conclusion the court did not examine the legislative history of the treaty, but simply relied on *Mahaney* and on *Hill* v. *United Airlines*, 550 F.Supp. 1048 (D. Kan. 1982). Neither case supports the proposition that Article 19 of the Convention provides a cause of action for bumping.[3]

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[3] As we have seen, *Mahaney* supports the conclusion that the Convention does *not* provide a cause of action for bumping. In *Hill*, the plaintiffs sued the airline for intentional misrepresentation when they were delayed due to false information about a con-

(footnote continued on following page)

Finally, Mexicana's interpretation of the Warsaw Convention—that the Convention is the exclusive remedy for passengers bumped from international flights—rests on an anomalous reading of the FAA. Section 404(b) of the FAA prohibited discrimination by an "air carrier or foreign air carrier." Mexicana asks us to interpret the word "discrimination" to include discriminatory bumping when applied to domestic air carriers—*see Karp, supra*—but not when applied to foreign air carriers. We reject such an improbable reading of the FAA.

We conclude that the Warsaw Convention does not provide a cause of action for bumping. Therefore, the two-year statute of limitations set forth in Article 29(1) of the Convention does not bar the Wolgels' claim.

B.

We are left with the question of the applicable statute of limitations for claims brought under the FAA. We conclude that the appropriate limitations period is five years.

"When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." *Wilson*

(footnote continued from previous page)

necting flight. The airline argued that the Warsaw Convention was the plaintiffs' exclusive remedy. The court held that the Convention did not bar the plaintiffs' action because "[l]iability, if any, is predicated on defendant's commission of the tort of misrepresentation, a circumstance completely outside of the Warsaw Convention." *Hill*, 550 F.Supp. at 1054. The *Hill* court mentioned Article 19, but did not discuss bumping. Thus, neither the history of the Convention nor the case law supports the *Harpalani* court's reasoning. We accordingly decline to adopt that court's conclusion that the Convention provides a cause of action for bumping.

v. *Garcia,* 471 U.S. 261, 266-67 (1985); *see Del Costello* v. *International Brotherhood of Teamsters,* 462 U.S. 151, 158 (1982). Illinois provides a two-year statute of limitation for personal injury claims, *see* Ill. Ann. Stat. ch. 110, ¶ 13-202 (Smith-Hurd 1984), a ten-year statute of limitation for contract claims, *see id.* at ¶ 13-206, and a five-year statute of limitation for, among other things, "all civil actions not otherwise provided for," *see id.* at ¶ 13-205.

Section 404(b) of the FAA is concerned with more than personal injury or breach of contract. The statute reflects "a desire to provide widescale protection against discriminatory rates and practices," *Mason* v. *Belieu,* 543 F.2d 215, 219 (D.C. Cir.), *cert. denied,* 429 U.S. 852 (1976), and prohibits "unjust discrimination" in broad terms. *See, e.g., United States Dept. of Transportation* v. *Paralyzed Veterans,* 106 S.Ct. 2705, 2709 (1986) (The Civil Aeronautics Board has relied on § 404(b) as authority for the promulgation of regulations to protect the handicapped.); *DHL Corp.* v. *C.A.B.,* 659 F.2d 941 (9th Cir. 1981) (Section 404(b) prohibits rate discrimination.); *Fitzgerald* v. *Pan American World Airways,* 229 F.2d 499 (2d Cir. 1956) (Section 404(b) prohibits racial discrimination.). The five-year period of limitations in ¶ 13-205 is thus the most appropriate state statute.

We adopt a five-year statute of limitations for claims brought under § 404(b). The Wolgels' complaint, which was filed exactly five years after their injury, is timely. *See Urbaniak* v. *John Berg Mfg. Co.,* 9 Ill. App.3d 508, 292 N.E.2d 460 (1st Dist. 1972); *Price* v. *Ill. Bell Tel. Co.,* 269 Ill. App. 581, 587-88 (1st Dist. 1933); *Roth* v. *Lundin,* 237 Ill. App. 456, 457 (1st Dist. 1925).

III.

The Wolgels' suit for discriminatory bumping under the FAA is not barred by the two-year statute of limitations set forth in the Warsaw Convention, because the Convention does not cover actions for bumping. Rather, the applicable statute of limitations for the Wolgels' FAA claim is a five-year period borrowed from Illinois law. Because the Wolgels filed their suit exactly five years after their injury, their complaint was timely. The judgment of the district court is reversed and the case remanded for further proceedings.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Order of District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 86 C 3409

JUDGE CHARLES R. NORGLE

JOSEPH D. WOLGEL and EDYTHE R. WOLGEL,

Plaintiffs,

vs.

MEXICANA AIRLINES, a foreign corporation,

Defendant.

ORDER

Plaintiff, Joseph and Edythe Wolgel (THE WOLGELS), filed this lawsuit in the Circuit Court of Cook County on April 17, 1986. Defendant, Mexicana Airlines, Inc. (MEXICANA), was served at its Chicago office on May 2, 1986. Mexicana removed the action to this Court on May 14, 1986. The Wolgels do not dispute the Court's exercise of jurisdiction in accordance with 28 U.S.C. §§1441, 1602. *See* 28 U.S.C. §§1603, 1605.

The Complaint is in two counts. Count I alleges a breach of contract. Count II alleges a tortious breach of the contractual relationship between the parties. Both counts

arise from Mexicana's refusal to allow the Wolgels to board a Chicago to Acapulco flight on April 17, 1981 for which they held a ticket.

Mexicana has moved to dismiss the Complaint as barred by the applicable period of limitations. Mexicana insists the applicable period of limitations (two years) is stated in the Warsaw Convention (CONVENTION). *Convention for the Verification of Certain Rules Relating to International Transportation by Air,* concluded at Warsaw, Poland, October 12, 1929. 49 Stat. 3000 (1934); T.S. 876; 49 U.S.C. §1502 note (1976). The Wolgels argue the Convention does not apply to airline "bumping" and that, even if it did, the allegation of tortious conduct stated in Count II takes this case outside the reach of the Convention. The Court disagrees with plaintiff's reading of the Convention. Mexicana's motion to dismiss must be granted.

The provisions of the Warsaw Convention (Article 1(2)) apply to plaintiff's allegations of unlawful "bumping." *See Harpalani* v. *Air India, Inc.,* 622 F. Supp. 69, 72 (N.D. Ill. 1985). Moreover, the Convention provides the exclusive remedy in this case. *Id.* at 73. *See also Stone* v. *Mexicana Airlines, Inc.*, 610 F.2d 699, 700 (CA 10 1979); *Bapes* v. *Trans World Air Lines, Inc.,* 209 F. Supp. 380, 381 (N.D. Ill. 1962). The Wolgels must, therefore, meet the limitations period stated in the Convention.

As stated above, the Wolgels were refused boarding ("bumped") by Mexicana on April 17, 1981. This action was filed on April 17, 1986, some five years later. Article 29(1) of the Convention provides a two year period of limitation for damages brought under the Convention. Having concluded the Convention provides the sole remedy

in this case, this action could have been commenced no later than April 17, 1983. The Wolgels are tardy; Mexicana's motion to dismiss is granted.

IT IS SO ORDERED.

ENTER:

/s/ CHARLES R. NORGLE
CHARLES RONALD NORGLE, Judge
U.S. DISTRICT COURT

DATED: 7-7-86

Convention for the Unification of Certain Rules Relating to International Transportation by Air and Additional Protocol, Concluded at Warsaw, October 12, 1929. 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §1502 note (1976).

Chapter I

Scope-Definitions

Article I

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate, or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

* * *

49 Stat. 3014.

Convention for the Unification of Certain Rules Relating to International Transportation by Air

Chapter III

Liability of the Carrier

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018.

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have

been the result of an event which took place during the transportation by air.

49 Stat. 3019.

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

49 Stat. 3019.

Article 29

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

49 Stat. 3021.

Article 30

(1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the

contract deals with that part of the transportation which is performed under his supervision.

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

49 Stat. 3021.

Supreme Court, U.S.
FILED
OCT 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-410

In The
Supreme Court of the United States
October Term, 1987

—o—

MEXICANA AIRLINES,

Petitioner,

v.

JOSEPH D. WOLGEL and EDYTHE R. WOLGEL,

Respondents.

—o—

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

—o—

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QUESTIONS PRESENTED FOR REVIEW

Is the Warsaw Convention inapplicable to cases of nonperformance of a contract and claims for discriminatory "bumping" under § 404(b) of the Federal Aviation Act as the Seventh Circuit held?

Is there any valid reason for applying the two-year limitation period of the Warsaw Convention to actions arising under § 404(b) of the Federal Aviation Act for domestic flights which were never performed?

Is there any valid reason for making a distinction between actions for nonperformance of contracts for domestic flights arising under § 404(b) of the Federal Aviation Act and actions under that statute involving nonperformance of contracts for international flights, for the purpose of applying different limitation periods for unperformed domestic flights and unperformed international flights?

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No. 87-410

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JOSEPH D. WOLGEL and EDYTHE R. WOLGEL,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, Joseph D. Wolgel and Edythe R. Wolgel, pray that the petition for writ of certiorari be denied.

Rule 28.1 of the Supreme Court Rules concerning corporations is inapplicable to respondents.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

1. The Warsaw Convention does not apply to cases of non-performance of a contract or claims for discriminatory bumping under § 404(b) of the Federal Aviation Act.

Petitioner's statement of the case is inaccurate. As indicated by the Court of Appeals, respondents' action was for discriminatory "bumping" and there was no factual dispute raised in the District Court. App. 1a, 2a. It is also not true that "(a)ny claim arising out of the passenger tickets . . . is subject to the uniform liability rules of the (Warsaw) Convention" as claimed on page 4 of the petition. App. 6a. [Parenthetical matter added.]

The respondents actually have two claims. One is for nonperformance of a contract entered into in Illinois. The other is for discriminatory "bumping" under § 404 (b) of the Federal Aviation Act ("FAA"), 49 U.S.C. app. § 1374(b) (1982) (repealed 1983). In both the District Court and the Court of Appeals, the petitioner's sole argument was that the respondents' exclusive remedy was under the Warsaw Convention and that their claims were barred by the two-year limitation period.

Although the petitioner now concedes that the Warsaw Convention does not apply to respondents' claims since no transportation occurred, it now urges for the first time that the two-year limitation period of the Warsaw Convention be engrafted onto § 404(b) of the FAA even though no international transportation ever took place in this case.

2. Since § 404(b) of the FAA applies to both domestic and foreign air carriers who fail to furnish transportation, there is no legitimate reason for engrafting the two-year limitation period of an international treaty involving actual transportation, contrary to settled practice.

The petitioner has overlooked the express language of § 404(b) of the FAA which prohibits discrimination by both domestic and foreign air carriers. The petitioner offers no rational argument as to why claims against domestic air carriers who fail to furnish domestic transportation should be subject to a two-year limitation period. Nor, for that matter, does it offer any rational argument as to why an international treaty governing actual transportation should be applied in any manner to a statute made expressly applicable to the failure to furnish transportation.

If the petitioner is urging that the two-year limitation period be engrafted only for international flights that do not take place under § 404(b) of the FAA, then it is, in effect, arguing for an even greater multiplicity of limitation periods.

———o———

CONCLUSION

There is no legitimate basis for the petitioner's new argument that unperformed international flight contracts which are not governed by the Warsaw Convention should nevertheless be considered as if they were performed so as to be subject to the two-year limitation period and that

such unperformed contracts be treated differently than unperformed domestic flight contracts contrary to the language of § 404(b) of the FAA which make no distinction between unperformed domestic and international flight contracts.

Respectfully submitted,

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